MOTION FILED
NOV 6 1989

No. 89-156

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE, *et al.*,
Petitioners,

v.

EDWARD J. and DEBORA A. DAVENPORT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Pursuant to Rule 36.3 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have consented to the filing of this brief; their letter of consent has been filed with the Clerk. Respondents have refused consent.

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. This case is of grave concern to *amici*. The Court of Appeals for the Third Circuit ruled that a discharge under Chapter 13 of the Bankruptcy Code nullifies a state court's crim-

inal sentence requiring restitution as a condition to probation. The decision rejects this Court's persuasive dicta in *Kelly v. Robinson*, 479 U.S. 36 (1986), that criminal sanctions are not dischargeable "debts" within the meaning of the Bankruptcy Code, and violates the Court's longstanding policy, based on principles of federalism and comity, against federal court interference with state criminal prosecutions.

As a practical matter, this ruling, unless reversed by this Court, will allow thousands of convicted criminals to avoid fulfilling any sentence simply by obtaining a discharge of "debts" under Chapter 13 of the Bankruptcy Code. As a result, it will discourage state judges from utilizing fines, restitution orders, and other monetary sanctions in criminal sentencing, despite the fact that many studies have shown that these sanctions most effectively serve the purposes of deterrence, retribution, and rehabilitation for many crimes. With restitution a less attractive option, the state courts would have to rely more heavily on incarceration in fashioning criminal sentences, thus placing added burdens on the States' already overtaxed prison systems.

Amici submit that the ruling below is wrong. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* seek leave to file this brief to assist the Court in its resolution of the case.

Respectfully submitted,

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QUESTION PRESENTED

Whether a criminal restitution order imposed as a condition of probation is a dischargeable "debt" in a case under Chapter 13 of the Bankruptcy Code.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	1
INTRODUCTION AND SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. A FEDERAL BANKRUPTCY COURT'S DISCHARGE OF A STATE COURT'S CRIMINAL RESTITUTION ORDER CONSTITUTES AN IMPERMISSIBLE INTRUSION UPON THE STATE CRIMINAL SENTENCING PROCESS	6
II. A CRIMINAL RESTITUTION ORDER DOES NOT CREATE A "DEBT" DISCHARGEABLE UNDER CHAPTER 13 OF THE BANKRUPTCY CODE	12
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: Page

Bearden v. Georgia, 461 U.S. 660 (1983) 3, 9
In re Brown, 39 Bankr. 820 (Bankr. M.D. Tenn. 1984) 9
Commonwealth v. Erb, 286 Pa. Super. 65, 428 A.2d 574 (1981) 2
Commonwealth v. Fuqua, 267 Pa. Super. 504, 407 A.2d 24 (1979) 2
Commonwealth v. Kerr, 298 Pa. Super. 257, 444 A.2d 758 (1982) 2
Commonwealth v. Mourar, 349 Pa. Super. 583, 504 A.2d 197 (1986), vacated, 517 Pa. 83, 435 A.2d 1050 (1987) 17
Commonwealth v. Wood, 300 Pa. Super. 463, 446 A.2d 948 (1982) 2, 9, 19
Engle v. Isaac, 456 U.S. 107 (1982) 7
Gagnon v. Scarpelli, 411 U.S. 778 (1973) 3
Kelly v. Robinson, 479 U.S. 36 (1986) ..... *passim*
Midlantic National Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494 (1986) .. 13, 16
In re Moore, 111 F. 145 (W.D. Ky. 1901) 13, 14
State v. Mosesson, 78 Misc. 2d 217, 356 N.Y.S. 2d 483 (1974) 17
TVA v. Hill, 437 U.S. 153 (1978) 13
United States v. Alexander, 743 F.2d 472 (7th Cir. 1984) 18
United States v. Ron Pair Enterprises, 109 S. Ct. 1026 (1989) 13, 16
United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, 484 U.S. 365 (1988) 13
In re Vik, 45 Bankr. 64 (Bankr. N.D. Iowa 1984) .. 8
Younger v. Harris, 401 U.S. 37 (1971) 6

STATUTES:

11 U.S.C. § 101 12
11 U.S.C. § 101(4) 4, 13
11 U.S.C. § 101(4)(A) 12, 15, 17
11 U.S.C. § 101(11) 12
11 U.S.C. § 362(a)(1) 17
11 U.S.C. § 362(b)(1) 17

TABLE OF AUTHORITIES—Continued

Page

11 U.S.C. § 523(a)(7) 4, 17
11 U.S.C. § 524(a)(2) 8
11 U.S.C. § 701 *et seq.* ..... *passim*
11 U.S.C. § 727 8
11 U.S.C. § 944 8
11 U.S.C. § 1141 8
11 U.S.C. § 1228 8
11 U.S.C. § 1301 *et seq.* ..... *passim*
11 U.S.C. § 1328 ..... 8, 12, 17
11 U.S.C. § 1328(a) 3, 12
18 U.S.C. § 3579(a)(2) 10
28 U.S.C. § 2254 7
28 U.S.C. § 2254(b) 7
28 U.S.C. § 2254(d) 7
18 Pa. Cons. Stat. § 1106 9
18 Pa. Cons. Stat. § 1106(a) 2
18 Pa. Cons. Stat. § 1106(b) 2
18 Pa. Cons. Stat. § 1106(c)(3) 2, 9
18 Pa. Cons. Stat. § 1106(f) 19
18 Pa. Cons. Stat. § 1106(g) 19
42 Pa. Cons. Stat. § 9754(c) 9

LEGISLATIVE MATERIALS:

H. R. Rep. No. 595, 95th Cong., 1st Sess., reprinted in 1978 U.S. Cong. & Admin. News 5963 ..... 6, 14, 14-15, 15, 16
128 Cong. Rec. S23399 (1982) 10

OTHER AUTHORITIES:

Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931 (1984) 11
N.Y. Times, Oct. 28, 1989, § 1 at 9, col. 1 11
N.Y. Times, Oct. 31, 1989, § D at 23, col. 1 11
U.S. Department of Justice, *Bureau of Justice Statistics Annual Report Fiscal 1985* (April 1986) .....
Washington Post, Nov. 25, 1986, A-1 10
Washington Post, Sept. 18, 1989, A-1 10

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INTEREST OF THE *AMICI CURIAE*

The interest of *amici* is set forth in the motion accompanying this brief.

STATEMENT

Pennsylvania's criminal restitution statute authorizes a sentencing judge to order restitution as a condition of probation or parole in any case where the offender has

obtained property unlawfully or caused personal injury to the victim of the crime. 18 Pa. Cons. Stat. § 1106(a), (b). As the Pennsylvania courts have explained, criminal restitution furthers the "rehabilitative goal" of punishment by "impressing upon the offender the loss he has caused and his responsibility to repair that loss as far as it is possible to do so." [1] For this reason and because restitution affords courts an attractive alternative to incarceration, Pennsylvania judges imposed restitution penalties in more than 5,000 cases in 1987 alone.

Respondents, Edward and Debora Davenport, each pleaded guilty on September 17, 1986, to one felony count and two misdemeanor charges of welfare fraud, based on their fraudulent receipt of $4,144.80 in public assistance benefits and food stamps over a seven-month period in 1984 and 1985. J. A. 56-70. Respondents each were sentenced by the Bucks County, Pennsylvania, Court of Common Pleas to one year probation and ordered, as a condition to probation, to make criminal restitution of the amount fraudulently obtained from the government. Each was ordered to pay $2,072.40, in ten monthly installments of $208 beginning in December 1986.

Respondents never made any of the required restitution payments, nor did they invoke statutory procedures to seek modification of the restitution order on grounds of inability to pay. See 18 Pa. Cons. Stat. § 1106(c)(3). Instead, on May 25, 1987, they filed a voluntary petition under Chapter 13 of the Bankruptcy Code, and in the petition listed the criminal restitution obligation as an "unsecured debt."

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[1] *Commonwealth v. Wood*, 300 Pa. Super. 463, 467, 446 A.2d 948, 950 (1982), citing *Commonwealth v. Kerr*, 298 Pa. Super. 257, 260, 444 A.2d 758, 760 (1982), quoting *Commonwealth v. Erb*, 286 Pa. Super. 65, 79, 428 A.2d 574, 581 (1981), and *Commonwealth v. Fuqua*, 267 Pa. Super. 504, 508, 407 A.2d 24, 26 (1979).

Based on respondents' failure to pay restitution, the Probation Department commenced proceedings to determine whether respondents had violated parole. Under Pennsylvania procedures, the offender is entitled to a *Gagnon II* [2] hearing at which the court must consider whether, given the financial circumstances of the defendant, nonpayment constitutes violation of probation. When the Probation Department refused to withdraw the charges despite the pendency of the bankruptcy proceeding, respondents commenced an adversary proceeding in bankruptcy court seeking a declaration that the restitution order was a dischargeable debt and to enjoin the Probation Department from taking any "further action" to "collect the restitution debt." J.A. 31.

The bankruptcy court entered judgment for respondents, holding that the restitution obligation was a dischargeable debt under Chapter 13 of the Bankruptcy Code. Pet. App. 68a-102a. Respondents subsequently submitted a repayment plan under Chapter 13 that provided for total payments to all creditors and the trustee of only $120 over a twelve-month period. After that plan was confirmed and payments were completed, the bankruptcy court granted the respondents a discharge under 11 U.S.C. § 1328(a).

The Commonwealth, petitioners in this Court, appealed the ruling on dischargeability of the restitution order, and the district court reversed, holding that Congress did not intend to permit the discharge of criminal restitution orders under Chapter 13 and that a discharge would violate principles of federalism. Pet. App. 59a-66a. A panel of the Third Circuit, by a two-to-one vote, reversed the

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[2] In *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973), the Court held that due process mandates preliminary and final revocation of probation hearings, known as *Gagnon I* and *Gagnon II* hearings. Under *Bearden v. Georgia*, 461 U.S. 660 (1983), an offender may not be penalized for failing to comply with a restitution order that he or she does not have the ability to pay.

district court and reinstated the bankruptcy court's ruling. Pet. App. 1a-58a. The majority "[found] the reasoning of the Court of Appeals in *In re Robinson*, [776 F.2d 30 (2d Cir. 1985), *rev'd sub nom. Kelly v. Robinson*, 479 U.S. 36 (1986),] persuasive and conclude[d] that the restitution obligation constitutes a debt so long as any person or entity has a right to enforce that obligation" (Pet. App. 25a), even though the Second Circuit's reasoning relied on by the court below was rejected by this Court in *Kelly*.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Kelly v. Robinson*, the Court held that a criminal restitution order imposed as a condition of probation is not a dischargeable debt under Chapter 7 of the Bankruptcy Code. The Court construed the statutory language "in light of the history of bankruptcy court deference to criminal judgments," "in light of the interests of the States in unfettered administration of their criminal justice systems," and "against the background of an established judicial exception to discharge for criminal sentences, including restitution orders." 479 U.S. at 43-46. Because the Court found an applicable exception to Chapter 7 discharge in Section 523(a)(7) of the Code, it did not specifically decide whether a restitution order is a "debt" within the meaning of Section 101(4) of the Code. Nonetheless, the Court expressed "serious doubts whether Congress intended to make criminal penalties 'debts,'" and stated that, notwithstanding the "broadly drafted" definition of "debt," "nothing in the legislative history . . . compels the conclusion that Congress intended to change the state of the law with respect to criminal judgments." 479 U.S. at 50 & n.12.

The same principles of federalism and statutory interpretation on which the Court relied in *Kelly* also require the conclusion that a criminal restitution order is not a dischargeable debt under Chapter 13.

1. A bankruptcy court's discharge of a restitution order imposed as a condition of probation violates the fundamental policy against federal interference with a State's sovereign power to punish criminals. First, the discharge nullifies a portion of a lawfully entered criminal sentence and effectively disables the State from imposing any alternative sentence. Second, the discharge constitutes an impermissible intrusion upon the state court fact-finding process. The discharge not only nullifies any previous judicial findings that the offender is able to make restitution, but also preempts available state processes that permit the sentencing court to reduce or eliminate the restitution obligation where a change in the offender's financial circumstances renders compliance unduly burdensome.

To permit Chapter 13 discharges of criminal monetary sanctions would have a devastating effect on the sentencing process generally. Sentencing courts would feel constrained to temper their own and their legislators' judgment that rehabilitation is the most effective form of punishment with the knowledge that the convicted criminal might avoid fulfilling the sentence by obtaining a Chapter 13 discharge. Inevitably, courts will be faced with the Hobson's choice of absolving offenders of punishment or imposing prison terms that may do the offender more harm than good and will cost the States thousands of dollars per prisoner per year.

2. Congress did not intend to permit the discharge of criminal sentences under the Bankruptcy Code. The new Code was enacted, as the Court in *Kelly* explained, "against the background of an established judicial exception to discharge for criminal sentences, including restitution orders." 479 U.S. at 46. There is no evidence in either the statutory language or the legislative history that Congress intended to change that settled rule. Indeed, the history most closely on point is the House Report's explicit statement that the "bankruptcy laws are

not a haven for criminal offenders, but are designed to give relief from financial over-extension." H.R. Rep. No. 595, 95th Cong., 1st Sess. 342, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6299.

The court below erroneously relied on the expanded definition of "claim" in the new statute, failing to recognize that the language was intended to allow resolution of contingent, unmatured, unliquidated, and similar obligations not previously "provable" under the Bankruptcy Act, not to nullify criminal orders. The discharge of a criminal restitution order would defeat the purpose of the order to impress upon the criminal offender his responsibility to repair the loss that he or she has caused, an effect that is not mitigated by permitting the State to share in any distribution of the estate. It also would be inconsistent with Congress's purpose to enable more debtors to use the Chapter to fulfill their moral obligation to repay their debts.

ARGUMENT

I. A FEDERAL BANKRUPTCY COURT'S DISCHARGE OF A STATE COURT'S CRIMINAL RESTITUTION ORDER CONSTITUTES AN IMPERMISSIBLE INTRUSION UPON THE STATE CRIMINAL SENTENCING PROCESS.

The Court in *Kelly* reaffirmed its "deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings." 479 U.S. at 47. That conviction reflects " 'the fundamental policy against federal interference with state criminal prosecutions' " (*id.*, quoting *Younger v. Harris*, 401 U.S. 37, 46 (1971)), that lies at the heart of the principles known as "Our Federalism." As the Court explained in *Younger* (401 U.S. at 44), the policy of deference to state criminal proceedings is based on

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Respect for state processes takes on special importance when a federal court is asked to review a state criminal sanction because "[t]he right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States." *Kelly*, 479 U.S. at 47. Thus, while state criminal proceedings are subject to limited collateral review through the writ of habeas corpus, even in that context the Court has emphasized that the "States possess primary authority for defining and enforcing the criminal law. . . . Federal intrusions into state criminal trials frustrate . . . the States' sovereign power to punish offenders." *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

Because a Chapter 13 discharge of a criminal restitution order nullifies a portion of the state court judgment, the analogy to federal habeas proceedings is instructive. Even though the writ of habeas corpus protects against a state court's infringement of a defendant's constitutional rights, it guarantees only the fundamental fairness of the criminal process as applied to the defendant, not the correctness of the particular result. Federal procedures for habeas corpus relief, 28 U.S.C. § 2254, require deference to proper state process. Section 2254(b) provides that the writ shall not be granted "unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." Under Section 2254(d), "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct."

A bankruptcy court's discharge of a restitution order entered as a condition of probation constitutes an im-

permissible federal intrusion on a State's sovereign power to punish criminals. First, the discharge vacates a portion of a criminal sentence that has been entered in full accord with all substantive and procedural mandates of the Constitution. The invasion of state rights cannot be justified on the ground that a discharge would relieve the debtor of burdensome obligations or give him a "fresh start"; to the contrary, the "burden" on the offender is a necessary component of the effectiveness of the restitution order as a deterrent and rehabilitative measure, and is less severe than alternative forms of punishment. Clearly, a bankruptcy court could not purport to "discharge" a sentence of incarceration if selected in the first instance by the state court. "The result should not be different merely because the state chose a less restrictive means to further its penal goals." *In re Vik*, 45 Bankr. 64, 68 (Bankr. N.D. Iowa 1984).[3]

The intrusion is particularly severe because, unlike the situation where a conviction is disturbed on habeas review and the State can retry or resentence the defendant, the State may be disabled from fashioning an alternative sentence once the restitution penalty has been discharged. This disability results from the automatic stay in bankruptcy and from 11 U.S.C. § 524(a)(2), which provides that a discharge in bankruptcy operates as an injunction against an action to collect any debt discharged under Section 727, 944, 1141, 1228, or 1328 of the Code. Alluding to the automatic stay, the bankruptcy judge in this case made clear that the State would be acting at its peril

[3] The distinction that restitution imposes a direct monetary obligation on the offender is unpersuasive. Incarceration, for example, imposes even more severe, albeit indirect, financial sanctions because it precludes the offender from being gainfully employed. Significantly, incarceration also imposes substantial costs and burdens on the State. Similarly, a sentence ordering community service as a condition of probation may cause significant financial burdens by limiting the time the offender has available for gainful employment.

if it proceeded with a revocation of probation hearing based on respondents' noncompliance with the restitution order. See, *e.g.*, Tr. of Oct. 26, 1987, at 39-40 (reprinted in petitioners' appendix in the Third Circuit at 56a-57a). Indeed, in *Kelly*, the respondent had sought and obtained from the court of appeals a remand for entry of an injunction that effectively would have barred the State from seeking to revoke the respondent's probation and from requesting alternative punishment, including incarceration. See also *In re Brown*, 39 Bankr. 820, 829-30 (Bankr. M.D. Tenn. 1984) (enjoining prosecutor from seeking revocation of probation for nonpayment of restitution following discharge in bankruptcy).

Second, a discharge impermissibly intrudes on the state court's fact-finding processes by nullifying findings regarding the offender's ability to pay restitution and preempting state processes to consider alleged changes in the offender's financial condition. As required by *Bearden v. Georgia*, 461 U.S. 660 (1983), Pennsylvania has incorporated a panoply of procedures into the sentencing and revocation of probation process to ensure that the restitution order does not exceed the offender's ability to pay. Pennsylvania's general restitution statute, 18 Pa. Cons. Stat. § 1106, requires that before the sentencing court may order restitution it must consider "on the record" several factors, including "that the amount awarded does not exceed the defendant's ability to pay." *Commonwealth v. Wood*, 300 Pa. Super. at 467, 446 A.2d at 949-50. See also 42 Pa. Cons. Stat. § 9754(c) (court may order restitution only "in an amount [the defendant] can afford to pay"). If as a result of changed circumstances during the probation period the offender becomes financially unable to comply with the restitution order, he may move the sentencing court to alter or amend the order. See 18 Pa. Cons. Stat. § 1106(c)(3). The sentencing court, moreover, cannot find a violation of probation if nonpayment is caused by the offender's financial circumstances. See page 3 and note 2 *supra*.

The federal discharge of a restitution order not only nullifies the original findings of the sentencing judge, it also preempts state procedures for modifying restitution orders and for determining whether probation has been violated. The result is an intrusion into the state process far more extensive than that authorized even in habeas proceedings. The bankruptcy debtor, unlike the habeas petitioner, is excused from exhausting available state remedies, and he need not overcome the presumption of correctness generally afforded state court findings of fact.

Third, the intrusive effect that Chapter 13 discharges would have in particular cases is greatly exacerbated by the effect that such discharges would have on sentencing judges generally. Every State and the District of Columbia presently authorize use of restitution orders, and in many jurisdictions such orders are mandatory.[4] As the Court has noted, restitution is an important deterrent and rehabilitative penalty:

> Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a

[4] The court of appeals ruling also would undermine federal policy by allowing the discharge of federal criminal restitution orders. See, *e.g.*, Washington Post, Nov. 25, 1986, A-1 (Ivan F. Boesky to pay $50 million in restitution for illegal insider information); Washington Post, Sept. 18, 1989, A-1 ("More than 37,000 people convicted of federal crimes and sentenced to pay fines or restitution . . . owe the government more than $646 million, according to Justice Department figures.").

Congress, in the federal Victim and Witness Protection Act, enacted in 1982, emphasized the importance of restitution as a sentencing tool. The statute not only authorizes restitution but requires sentencing judges to state reasons on the record if no restitution or only partial restitution is ordered. 18 U.S.C. § 3579 (a)(2). Ironically, the statute was intended to provide a model for action by state and local officials (see 128 Cong. Rec. S23399 (1982) (statement of Sen. Hawkins)), and in fact has influenced a number of subsequent state enactments.

> penalty will affect the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and punishment gives restitution a more precise deterrent effect than a traditional fine.

Kelly v. Robinson, 479 U.S. at 49 n.10, citing Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 937-41 (1984). It also is an effective retributive penalty because the punishment is precisely proportional to the crime.

To permit the discharge of restitution orders would undermine state policies favoring restitution and "hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines, and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems." *Kelly v. Robinson*, 479 U.S. at 49. Moreover, in order to ensure that their laws do not lose all deterrent force, the States may be forced to incarcerate more criminals instead of relying on probation. The increased reliance on incarceration poses particular concern given the current crisis in prison overcrowding. See U.S. Department of Justice, *Bureau of Justice Statistics Annual Report Fiscal 1985* 35 (April 1986). It is increasingly difficult to find prison space for dangerous criminals, increasingly difficult to have any hope that incarceration can rehabilitate a criminal, and increasingly difficult even to protect the safety of inmates and prison employees, as recent events in petitioners' own system demonstrate.[5] These circumstances make it all the more critical that federal deference to state sentencing processes be enforced.

[5] N.Y. Times, Oct. 28, 1989, § 1 at 9, col. 1 ("Rioters Destroy Nearly Half the Buildings in a Pennsylvania Prison"); N.Y. Times, Oct. 31, 1989, § D at 23, col. 1 ("Many Are Leaving Prison Hit By Riots").

II. A CRIMINAL RESTITUTION ORDER DOES NOT CREATE A "DEBT" DISCHARGEABLE UNDER CHAPTER 13 OF THE BANKRUPTCY CODE.

Section 1328(a) of the Bankrupcty Code provides that upon completion of a repayment plan under Chapter 13, the court will discharge the debtor's "debts." Section 101 (11) defines a "debt" as a "liability on a claim." Section 101(4)(A), in turn, defines a "claim" as a "*right to payment*, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured" (emphasis added). The issue here is whether a criminal restitution order imposed as a condition of probation gives rise to a "right of payment" within the meaning of the Bankruptcy Code. While a court must look first to the statutory language, it "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Kelly*, 479 U.S. at 43 (quotation marks and citations omitted).

The strong policy of deference to state criminal judgments discussed in Point I above, the consistent authority treating criminal sanctions as nondischargeable under the Bankruptcy Act, the absence of any legislative history showing that the Code was intended to change that result, and the statutory language all compel the conclusion that a restitution order is not a dischargeable debt under Sections 101 and 1328 of the Code.

1. The starting point must be this Court's analysis in *Kelly*. There, the Court made clear that the statutory language must be construed "in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice system." 479 U.S. at 44.

That deference, the Court explained, was reflected in judicial interpretations of the discharge provisions in

Bankruptcy Act. Although a literal reading of the Act might have suggested that criminal penalties were dischargeable, the courts refused to reach that result. Instead, "[t]he rule preventing discharge of criminal fines was articulated promptly after the Bankruptcy Act of 1898 was passed, see *In re Moore*, 111 F. 145, 148-49 (W.D. Ky. 1901), and was uniformly accepted at the time Congress was considering the Code." *United States v. Ron Pair Enterprises*, 109 S. Ct. 1026, 1032 n.8 (1989), citing *Kelly*, 479 U.S. at 45-46. Thus, by the time that Congress amended the bankruptcy laws in 1978, there was "an established judicial exception to discharge of criminal sentences, including restitution orders." *Kelly*, 479 U.S. at 46.

2. " 'The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.' " *Kelly*, 479 U.S. at 47, quoting *Midlantic National Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 501 (1986). See also *Ron Pair Enterprises*, 109 S. Ct. at 1032-33; *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates*, 484 U.S. 365 (1988). If Congress had intended to allow bankruptcy courts to discharge restitution orders, " 'we can be certain there would have been hearings, testimony, and debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and so likely to arouse public outrage.' " *Kelly*, 479 U.S. at 51, quoting *TVA v. Hill*, 437 U.S. 153, 209 (1978) (Powell, J., dissenting).

The Court in *Kelly* indicated in dictum that "nothing in the legislative history of these sections [Section 101 (4) and the Code's priority and dischargeability sections] compels the conclusion that Congress intended to change the state of the law with respect to criminal judgments." 479 U.S. at 50 n.12. That dictum remains persuasive and should be followed. There is no pronouncement in the

committee reports or (to our knowledge) even from an individual legislator specifying an intent to change the settled rule. The House Report, the most frequently cited source of Congress's intent in enacting the Code, stated to the contrary: "The bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension." H.R. Rep. No. 595, 95th Cong., 1st Sess. 342, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6299. While the statement was made in the course of explaining the exception to automatic stay for criminal proceedings, it aptly expresses Congress's intent that the Code, like the former Act, be a means of adjusting "civil liabilities." *In re Moore*, 111 F. at 150.

The court of appeals misconstrued two aspects of the legislative history when it inferred that Congress intended to change existing law. First, the court cited Congress's intent to expand what constitutes a "claim." The broader definition was not enacted, however, in order to encompass criminal sanctions. Congress sought, rather, to redress problems created by the restrictive definition of "allowable" and "provable" claims under the Act that made it impossible for some debtors to resolve all their civil debts in bankruptcy. Congress was particularly concerned about contingent and unliquidated claims that were "non-provable" under the Act:

> [U]nder the liquidation chapters of the Bankruptcy Act, certain creditors are not permitted to share in the estate because of the non-provable nature of their claims. Thus, relief for the debtor is incomplete, and those creditors are not given an opportunity to collect in the case on their claims. The proposed law will permit complete settlement of the affairs of a bankrupt debtor, and a complete discharge and fresh start.

H.R. Rep. No. 595, *supra*, at 180, reprinted in 1978 U.S. Code Cong. & Admin. News at 6141. See also *id.* at 309, reprinted in U.S. Code Cong. & Admin. News at 6266 (the broader definition of "claim" in the Code "contemplates that all legal obligations of the debtor, *no matter how remote or contingent*, will be able to be dealt with in the bankruptcy case") (emphasis added). The statutory language is consistent with this approach. The Code's definition of "claim" includes any right to payment that is "unliquidated," "contingent," "unmatured," or "disputed" (11 U.S.C. § 101(4)(A)), but does not include any modifier that in any way suggests the incorporation of criminal sanctions.

Second, the court of appeals believed that including a criminal restitution order as a debt would fulfill Congress's purpose to encourage debtors to file under Chapter 13 rather than to liquidate under Chapter 7. It is true that Congress intended Chapter 13 to provide consumer debtors a more "realistic alternative to straight bankruptcy liquidation" than former Chapter XIII of the Act. H.R. Rep. No. 595, *supra*, at 117, reprinted in 1978 U.S. Code Cong. & Admin. News at 6078. But providing that alternative says nothing about what is a debt, as Judge Hutchinson pointed out in dissent from the decision below:

> Only debts are subject to discharge. The fact that chapter 13 contains a very broad discharge for obligations which are debts does not necessarily mean that criminal restitution orders should be considered debts. The question is not whether Congress intended to broaden the availability of the Chapter 13 remedy, but how great it intended this expansion to be. . . . [T]he Supreme Court teaches us that if Congress had intended to remove the power to finally define the extent to which a person convicted of crime should make restitution from the criminal courts and place it in the bankruptcy courts—by relegating his criminal restitution orders to the same status as his other obligations—it would have spoken more clearly.

Pet. App. 58a n.5.[8]

[8] Judge Hutchinson's comment is particularly apt in view of the issue posed by the bankruptcy judge in this case:

There is no evidence in the legislative history of Chapter 13 that Congress intended to make criminal penalties dischargeable. Indeed, such an intent would be inconsistent with Congress's objective to make Chapter 13 more widely available to consumer debtors, in part because "it satisfies many debtors' desire to avoid the stigma attached to straight bankruptcy and to retain the pride attendant on being able to meet one's obligations." H.R. Rep. No. 595, *supra*, at 118, reprinted in 1978 U.S. Code Cong. & Admin. News at 6079. It would make little sense on the one hand to encourage debtors more fully to meet their civil obligations and on the other to excuse them from fulfilling their "debt to society" engendered by criminal misconduct. Moreover, even without the discharge of a criminal restitution order, the Chapter 13 debtor is no worse off than under Chapter 7 (under which *Kelly* holds such orders are not dischargeable), and still enjoys the procedural and substantive advantages (*e.g.*, avoiding loss of all nonexempt property) of Chapter 13.

3. This Court repeatedly has cautioned against adopting an overly literal interpretation of the Bankruptcy Code that would conflict with state or federal policies, with other portions of the statute, or with the legislative history of the Code. *Ron Pair Enterprises*, 109 S. Ct. at 1031-32; *Kelly*, 479 U.S. at 49; *Midlantic National Bank*, 474 U.S. at 502. These cautions warrant particular attention here because the court of appeals' interpretation would defeat state and federal policies and is not the only reading permitted by the language of the Code.[7]

"Maybe . . . the focus of the inquiry, is to who decides where the disposable income goes."

"Is it the State Court or is it Bankruptcy Court?"

Tr. at 75, Third Circuit App. 92a. In that judge's view, and in the view of the court below, the bankruptcy court, not the State, makes that determination.

[7] Significantly, the court below, while purporting to rely on the "plain meaning" of the statute, in fact interpreted the language

The phrase "right to payment" implies a civil obligation that creates a debtor-creditor relationship, that is, an obligation that ultimately may be reduced to judgment. This implication is reinforced by the explanatory language that follows the phrase in Section 101(4)(A), which does not accurately characterize a restitution order imposed as a condition to probation or parole. This reading of the statute—to exclude criminal sanctions—is consistent with the extant state of the law at the time that the Code was enacted. The few state courts to consider the issue all had ruled that a discharge in bankruptcy did not affect a criminal restitution obligation because the sentence did not create a debtor-creditor relationship between the offender and the State. See *Kelly*, 479 U.S. at 46 & n. 7, citing, *e.g.*, *State v. Mosesson*, 78 Misc. 2d 217, 218, 356 N.Y.S.2d 483, 484 (1974). See also *Commonwealth v. Mourar*, 349 Pa. Super. 583, 603, 504 A.2d 197, 208 (1986) (criminal restitution order does not create a debtor-creditor relationship under Pennsylvania law), vacated, 517 Pa. 83, 534 A.2d 1050 (1987). The court of appeals' reading, moreover, creates a fundamental inconsistency between Section 362(b)(1) of the Code, which exempts from the automatic stay criminal proceedings against the debtor, and Section 1328, which would permit discharge of any monetary sanction resulting from such proceedings.[8]

The court of appeals' interpretation must fail because it does not acknowledge the fundamental distinction be-

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in view of the legislative history emphasizing the broad definition of the term "claim." See Pet. App. 19a-23a. As discussed at pages 14-15 above, the court misread the relevant legislative history.

[8] The court below echoed Justice Marshall's point in dissent in *Kelly* that, if criminal penalties are not debts, the language of Section 523(a)(7) of the Code would be unnecessary. To interpret "debts" to include criminal penalties, however, would create other inconsistencies, such as that between Section 362(a)(1) and Section 1328.

tween a criminal sanction and a civil debt. A bankruptcy proceeding is intended to permit a financially overextended debtor to adjust his private relationships with his creditors. The creditor's right—both inside and outside of bankruptcy—is to compensation, whether its claim is satisfied voluntarily (by the debtor's payment) or involuntarily (by foreclosure on security, execution on a judgment, etc.).

A criminal punishment, by contrast, reflects a public obligation, an obligation to society, and focuses solely on the offender. "The 'fresh start' envisioned by the imposition of probation conditions is entirely different from the one resulting from discharge in bankruptcy. Fundamental to the imposition of probation is the belief that its conditions will result in the rehabilitation of the probationer at no cost to the public safety." *United States v. Alexander*, 743 F.2d 472, 480 (7th Cir. 1984). Thus, while a fine or restitution order may result in compensation for injury caused by a crime, any compensatory benefits are ancillary to the deterrent, retributive, and rehabilitative effect of the sentence. See *Kelly*, 479 U.S. at 53. Viewed in this context, the court of appeals' concern that the State must be able to participate in distribution of a debtor's estate under Chapter 13 (see Pet. App. at 23a-24a), is irrevelant. Because the debtor does not care which of his creditors receive distributions from the Chapter 13 trustee or in what amount, so long as he receives a discharge, the trustee's payments to the State do not serve the punitive purpose of the restitution order.

Pennsylvania's criminal statute incorporates this distinction. The State recognizes that the "burden" resulting from compliance with a restitution order furthers the rehabilitative purpose:

> [W]here sacrifice is necessary, the probationer or parolee may learn to consider more carefully the consequences of his or her acts and thereby strengthen

> the offender's sense of responsibility. Thus, an order of restitution may properly require additional or alternative employment, a reduction of expenses, and even a temporary change in lifestyle in order to achieve that sense of responsibility which signals effective rehabilitation.

Commonwealth v. Wood, 300 Pa. Super. at 468, 446 A.2d at 950. The State has no "right to payment" if the offender fails to comply with the condition. The State may proceed either by contempt or by motion for revocation of probation or parole. See, *e.g.*, 18 Pa. Cons. Stat. § 1106 (f). But it has no power to seek a civil judgment and cannot seize property or garnish wages, and the restitution order may be modified or deleted if the offender becomes unable to pay. Moreover, a criminal restitution order does not affect any private rights that the victim of the crime may have against the offender, except that the amount of any civil award is reduced by any amount actually paid to the State and forwarded to the victim under the criminal judgment. *Id.* § 1106(g).[9]

The statutory language is, at best, open to competing interpretations. Under these circumstances, the Code should not be construed to overrule the settled doctrine, based on principles of comity, that a bankruptcy court discharge does not nullify any portion of a state criminal sentence.

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[9] The sentence in this case illustrates the distinction between civil and criminal obligations. In civil cases, respondents would be jointly and severally liable for the full amount that was criminally obtained. The sentencing court, however, ordered each respondent individually to pay 50% of the full amount. Obviously, one respondent would not be subject to revocation of probation based on the other respondent's nonpayment.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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November 16, 1989

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